OCT 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-126

BARRY SIGAL, a/k/a Barry Edwards, a/k/a David Allen Spector,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

ROBERT I. KALINA
575 Lexington Avenue
New York, New York 10022
Attorney for Petitioner

OWEN J. REDMOND
CHRISTOPHER REDMOND
619 W. Douglas
Wichita, Kansas 67213
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-126

BARRY SIGAL, a/k/a Barry Edwards, a/k/a David Allen Spector,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

In response to the memorandum for the United States herein, Petitioner respectfully draws the Court's attention to the following:

1. As to Footnote 3 in the Government's memorandum herein; respondent misreads *Cardwell*. By the definition propounded by respondent, *every* vehicle with wheels and a motor, being movable (i.e., *susceptible* of being displaced; Websters New Collegiate Dictionary – Seventh Edition) is to be an unprotected area (perhaps unprotected *per se*?) by reason of *potential* mobility. However, all motor vehicles are *potentially* movable. What is important here is the physical fact of the bad weather on the night of the

government entry which respondent conveniently ignores as relates to potential mobility.

2. The District Court and The Court of Appeals ignored the overwhelming physical fact of the bad weather at the time of Grants, N.M. entry. While you may drive a car in such weather, the sole government witness testified one could not fly an airplane in such weather. It is conceded that petitioner could not leave Grants, New Mexico that night due to the weather. The *weather* obviated exigent circumstances.

3. Agent Weatherman only approached the airplane "when it became apparent that petitioner was not going to come back to the airport shortly or it appeared he wasn't." (Rec. on App. P51 L 1-4). Judge Theis, in his opinion, stated that we must go by the facts and circumstances as they *appeared* to the Agent at the time of the seizure. The sole and uncontradicted testimony explicitly shows no exigent circumstance *as it appeared* to Agent Weatherman at that time; i.e.; "it *appeared* Sigal was not going to come back to the airport shortly" (supra).

4. The record reflects that Agent Weatherman relied *only* on odor for establishing Probable Cause. He repeatedly was asked by counsel on cross examination whether he had established Probable Cause after each "suspicious" circumstance he described, and each time replied he had no Probable Cause at each time; that Probable Cause arose from the one smelling of the airplane at Grants.

5. Respondent misreads either the trial record or *Payne* in stating that the case at bar differs from *Payne*. Here the

testimony of the agent was that he *knew* the petitioner was at a motel for the night, just as the officer knew that the defendant in *Payne* was abed. *Payne* is directly on point.

6. While the 4th Amendment issue is raised by respondent in *Bradshaw*, counsel sees no reason to hinge the time of the hearing of this petition on another Petition. *Sigal* v. *United States* deserves to be decided on its own, and in due course, without regard for *Bradshaw*. At best, the two petitions might be jointly decided.

It is submitted however, upon reading the petition and response in *Bradshaw*, that if certiorari is granted in *Bradshaw*, then certiorari should be herein granted.

If certiorari is denied in *Bradshaw*, then the judgment of the District Court in our cause should be reversed on the petition herein submitted; failing to so reverse said judgment on the petition alone, the least this court should do is grant the within petition for a Writ of Certiorari.

Respectfully Submitted,

ROBERT I. KALINA
Attorney for Petitioner

OWEN J. REDMOND
CHRISTOPHER REDMOND
of Counsel

October, 1974